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October 31, 2003

BY HAND DELIVERY

Mr. Walter Thomas
Secretary
Alabama Public Service Commission
RSA Union Building
8th Floor
100 N. Union Street
Montgomery, Alabama 36104

Re: Petition For A Declaratory Order Regarding Classification Of IP Telephony Service, Docket No. 29016

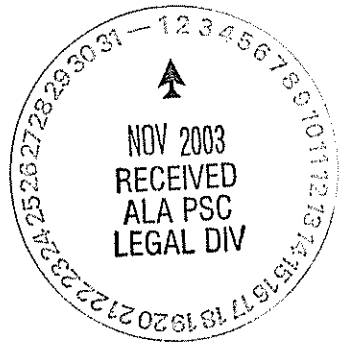
Dear Mr. Thomas:

Enclosed herewith for filing is the original, along with 10 copies of the joint comments of ICG Telecom Group, Inc. and Level 3 Communications, LLC. Thank you

Very truly yours,

Robin G. Laurie

RGL:amc
Enclosure



BEFORE THE ALABAMA
PUBLIC SERVICE COMMISSION

IN RE: Petition for Declaratory Order	)	Docket 29016
Regarding classification of IP Telephony	)	
Service	)	

JOINT COMMENTS
OF ICG TELECOM GROUP, INC. AND
LEVEL 3 COMMUNICATIONS, LLC

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ICG TELECOM GROUP, INC. AND
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Dated: October 31, 2003

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JOINT COMMENTS
OF ICG TELECOM GROUP, INC. AND
LEVEL 3 COMMUNICATIONS, LLC

ICG Communications, Inc. ("ICG") and Level 3 Communications, LLC ("Level 3") (collectively, "Joint Commenters") submit these comments pursuant to the Alabama Public Service Commission's ("Commission") Order, released August 29, 2003, establishing this docket to consider the Incumbent Local Exchange Carrier ("ILEC") Petition for a Declaratory Ruling regarding the classification of Internet Protocol ("IP") telephony, or Voice-Over-Internet-Protocol ("VoIP") services ("ILEC Petition").[1]

Introduction and Summary

ICG is a communications and information service provider[2] with a nationwide fiber-optic data and voice network. ICG's IP-based service offerings include broadband, dial-up Internet access, dedicated Internet access, VoIP and other IP services. ICG's IP-based services are primarily offered to Internet service providers ("ISPs"), interexchange carriers, and medium to large-sized businesses.

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[1] *Petition for Declaratory Order regarding classification of IP telephony*, Docket 29016, Order Establishing Declaratory Proceeding (Ala. P.S.C. Aug. 29, 2003).

[2] ICG presently holds a Certificate of Public Convenience and Necessity ("CPCN") to provide interexchange and local telecommunications services within the State of Alabama pursuant to Commission Order entered in Docket 25267.

Level 3 is a communications and information services company[3] with an international network completely optimized, end-to-end, for IP technology.[4] Level 3 offers IP-based services, including broadband transport, submarine transmission, and softswitch-based services. Level 3 offers services primarily to other carriers, ISPs, application service providers, and VoIP service providers.

Joint Commenters encourage the Commission to reject the ILEC Petition as an impermissible attempt to regulate, in violation of federal law, a broad range of VoIP services. As the U.S. District Court for the District of Minnesota found, federal law preempts state regulation of VoIP services that qualify as information services. The determination of whether a particular service is information or telecommunications requires a fact-based analysis. Therefore, any broad policy statements or rules attempting to impose state regulation on VoIP services would be necessarily overbroad and preempted.

The National Association of Regulatory Commissioners[5] and many state commissions have recognized the varied and complex issues concerning classification and potential regulation of VoIP services. Therefore, this Commission should follow the deregulatory approach of the Federal Communications Commission ("FCC") and the majority of state commissions and allow IP-based services to continue to develop unfettered by regulation created and intended for circuit-switched networks. At a minimum, Joint Commenters recommend that this Commission delay this proceeding until presented with a specific factual pattern. Premature or imprecise

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[3] Level 3 presently holds a CPCN to provide interexchange and local telecommunications services within the State of Alabama pursuant to Commission Order entered in Docket 26796.

[4] Level 3's all-IP network contains no circuit switches. Instead, its network is designed with softswitch architecture – a distributed set of hardware and software platforms used to seamlessly interconnect IP networks to the circuit switched network. With softswitch architecture, core-switching functions are not handled in each single unit, such as in a circuit switch network. Rather, switching functions are more efficiently distributed throughout the network to handle traffic in multiple locations. The result is a pure IP network that interoperates with the existing circuit-switched public network.

regulatory action on VoIP services by this Commission would inhibit, rather than enhance, competition in the Internet and telecommunications markets, resulting in a negative impact on the economic growth and vitality of Alabama. For example, should the Commission act prematurely and deem VoIP to be a telecommunications service subject to access charges, given that ILECs are already compensated by VoIP providers for use of the local network through local end-user service or cost-based reciprocal compensation payments, providers of VoIP and its related infrastructure will, at a minimum, be reluctant to invest in Alabama and may bypass the market altogether.

I. THE COMMISSION SHOULD AVOID TAKING ACTION THAT WOULD FORCE VOIP SERVICES INTO EXISTING TELECOMMUNICATIONS REGULATORY MODELS.

A. The Commission Should Follow the Deregulatory Approach of FCC and the Majority of State Commissions.

Although VoIP services have only recently come into existence, the unregulated status of these services may be traced back more than twenty years to the FCC's basic and enhanced regulatory decisions in the *Computer Proceedings* in which the FCC decided to allow enhanced services to flourish unregulated and unfettered by Title II of the Communications Act of 1934, as amended ("Act"). Since the Telecommunications Act of 1996 ("1996 Act"), the FCC's basic and enhanced regulatory dichotomy has evolved into an analysis of whether a service is a regulated telecommunications service or an unregulated information services. Since the 1996 Act, there have been many opportunities for the FCC to begin regulation of VoIP services as telecommunications services under the full panoply of Title II regulation, but the FCC has refused to do so.

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[5] As the Commission is likely aware, the NARUC has adopted a resolution that calls for the FCC and the

1. FCC Deregulatory Approach Toward VoIP Services

a) Basic and Enhanced Services Regulatory Scheme Pre-1996 Act.

The FCC established the distinction between "basic services" and "enhanced services" in the Second Computer Inquiry in 1980 ("*Computer II*").[6] There, the FCC defined "basic services" as "the common carrier offering of transmission capacity for the movement of information."[7] A basic service transmits information generated by a customer from one point to another, without changing the content of the transmission. The "basic" service category defines the transparent transmission capacity that makes up conventional communications service. In *Computer II*, the FCC indicated that because "basic" services are "wholly traditional common carrier activities," they are regulated under Title II of the Act.[8]

By contrast, in *Computer II*, the FCC defined unregulated "enhanced services" as:

> services, offered over common carrier transmission facilities used in interstate communications, which [1] employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; [2] provide the subscriber additional, different or restructured information; or [3] involve subscriber interaction with stored information.[9]

The FCC concluded in *Computer II* that regulation of enhanced services is unwarranted because the market for those services is competitive and consumers benefit from that competition.[10] The FCC reached this conclusion notwithstanding the close relationship between communications and some services classified as enhanced:

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state commissions to work together under the auspices of the Joint Conference on Advanced Services to address questions relating to VoIP.

6 *Second Computer Inquiry*, Final Decision, 77 F.C.C.2d 384 (1980); *modified on recon.* 84 F.C.C.2d 50 (1980); *further modified on recon.* 88 F.C.C.2d 512 (1981); *aff'd. sub nom. Computer and Communications Industries Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied* 461 U.S. 938 (1983) ("*Computer II*").

7 *Id.* at 420.

8 *Id* at 435.

9 *Computer II* at 387; *see also* 47 C.F.R. § 64.702(a).

10 *Computer II* at 433.

> We acknowledge, of course, the existence of a communications component. And we recognize that *some enhanced services may do some of the same things that regulated communications services did in the past*. On the other side, however, is the substantial data processing component in all these services.[11]

Prior to the enactment of the 1996 Act, the Commission retained and reaffirmed its existing basic/enhanced distinction in subsequent *Computer Proceedings*.[12] In determining whether a service meets the enhanced services definition, the FCC has applied each clause of the definition against the specific functionalities of the service.[13] The service is deemed "enhanced" if it meets the language of one of the three clauses, as interpreted by the FCC.

b) Telecommunications Service and Information Service Definitions in 1996 Act.

The 1996 Telecom Act codified the FCC's past decisions regarding the basic/enhanced regulatory dichotomy by creating new regulatory categories designated as "telecommunications service" and "information service," which are the equivalent of the FCC's prior categories of basic and enhanced services, respectively.

Specifically, the 1996 Act defines "telecommunications service" as "the offering of telecommunications for a fee directly to the public or to such classes of users as to be effectively available directly to the public regardless of the facilities used."[14] The term "telecommunications" is defined as "transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."[15]

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11 *Id* at 435 (emphasis added).

12 *See Third Computer Inquiry, Phase II*, Memorandum Opinion and Order on Reconsideration, 3 FCC Rcd. 1150 (1988) ("*Computer III*").

13 *See, e.g., U S WEST Communications, Inc. Petition for Computer III Waiver*, Order, 11 FCC Rcd. 1195 (1995); *AT & T 900 Dial-It Services and Third Party Billing and Collection Services*, Memorandum Opinion and Order, 4 FCC Rcd. 3429 (1989).

14 47 U.S.C. § 153(46).

15 47 U.S.C. § 153(43).

The definition of "telecommunications" and "telecommunications service" in the 1996 Act can be contrasted with "information service" which is defined by the 1996 Act as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service."[16]

The FCC's first opportunity to consider the relationship between its traditional basic/enhanced dichotomy and the telecommunications/information service dichotomy adopted in the 1996 Act occurred when establishing safeguards for Regional Bell Operating Company ("RBOC") provision of interLATA services. In the *Non-Accounting Safeguards Order*, the FCC concluded that those protocol processing services that qualify as "enhanced" should be treated as "information services" under the 1996 Act because they satisfy the statutory requirements of offering "a capability for ... transforming [and] processing ... information via telecommunications."[17] The FCC indicated in the *Non-Accounting Safeguards Order* that services that result in no net protocol conversion to the end user may continue to be classified as basic regulated services.[18]

c) Universal Service Report to Congress.

In its 1998 Report to Congress on Universal Service ("*Report to Congress*" or "*Report*"), the FCC again confirmed the parallel relationship between the basic/enhanced regulatory dichotomy and the telecommunications/information services definitions included in the 1996

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16 47 U.S.C. § 153(20).

17 *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended*, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd. 21905, 21955-58, ¶¶ 104-7 (1996) ("*Non-Accounting Safeguards Order*").

18 *Id.* at ¶ 106.

Act.[19] The FCC concluded that the categories of "telecommunications service" and "information service" contained in the 1996 Act are mutually exclusive and parallel the definitions of "basic service" and "enhanced service" in the FCC's *Computer II* proceeding. In this fashion, the Commission decided that Congress intended to maintain a regime in which information service providers are not subject to regulation as common carriers simply because they provide their service "via telecommunications."[20]

The *Report to Congress* presented the FCC with an opportunity to regulate VoIP services as telecommunications services under Title II of the Act, but it refused to do so. The FCC's refusal to change its classification of VoIP services in the context of its *Report to Congress* is noteworthy considering that concerns about the unregulated status of VoIP and other Internet services were some of the driving forces behind the Congressional mandate for the FCC to issue the *Report*. At the time, the Senators who pushed for the *Report to Congress* were urging the Commission to regulate VoIP and other Internet services as telecommunications services.[21]

Instead, in the *Report to Congress*, the FCC considered the existing technology for different types of VoIP services and tentatively determined that certain classes of "phone-to-phone" VoIP services appear to lack the characteristics that would render them unregulated "information services." The FCC stated that the characteristics of these classes of "phone-to-phone" VoIP services include:

(1) the provider "holds itself out as providing voice telephony or facsimile transmission service";
(2) the provider "does not require the customer to use C[ustomer] P[remise] E[quipment] different from that CPE necessary to place an ordinary touch-tone call (or facsimile transmission) over the public switched telephone network";
(3) the customer may "call telephone numbers assigned in accordance with the North American Numbering Plan and associated international agreements";

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19 *Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd. 11501(1998) ("*Report to Congress*").
20 *Id.* at ¶ 39.
21 *Id.* at ¶¶ 34-36, 49, 51, 78, 85.

(4) the provider "transmits customer information without net change in form or content."[22]

It is important to note that the ILEC Petition mischaracterizes the FCC's *Report to Congress* in numerous ways. First, the ILECs state that the classes of potential telecommunications "phone-to-phone" VoIP services include those IP telephony services in which the "provider does not require the use of a *computer* to transmit the message."[23] In the *Report to Congress*, however, the FCC did not use the term "computers" to distinguish the type of CPE used in the provision of those services. Rather, the FCC indicated that potential telecommunications "phone-to-phone" VoIP services would "not require the customer to use CPE different from that CPE necessary to place an ordinary touch-tone call (or facsimile transmission) over the public switched telephone network."[24] This is a meaningful distinction in that "telecommunication service" "phone-to-phone" VoIP products would allow a customer to place calls using only their ordinary telephones, whereas "information service" "phone-to-phone" VoIP products would require the customer to use a specialized IP-based CPE in order to receive the service.[25] The Commission should take note of this distinction.

Additionally, the ILECs want the Commission to believe that the "details" of VoIP services are not important, and if an IP-based service "completes a voice call" and "generally utilizes the local exchange carriers' network to originate and terminate the call," then the service should be regulated as a "telecommunication service."[26] These propositions are contrary to the FCC's positions in the *Report to Congress*.

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22 *Id* at ¶ 88.

23 ILEC Petition at 2 (emphasis added).

24 *Id*.

25 For example, ICG VoIP customers must have integrated access device ("IADs") installed on their premises in order to make use of ICG's VoIP services. The IAD connects to the data networks, Internet protocol phones and analog phones of the ICG customer. The IAD is specialized CPE that is required in order to subscribe to ICG's service offering. As a result, ICG's service offering fails to meet the FCC's second criteria for non-information service phone-to-phone IP calls as the service requires the installation of specialized CPE in order to utilize VoIP.

26 ILEC Petition at 2.

In its *Report to Congress*, the FCC refused to make any definitive regulatory determinations concerning any class of VoIP services due, in part, to a lack of details in the record regarding specific types of VoIP services.[27] The Commission recognized that regulatory distinctions based on technological differences in VoIP services could quickly be "overcome by changes in technology."[28] Likewise, the FCC acknowledged that definitive regulatory classifications for VoIP services were not appropriate due to the "emerging" and "dynamic" nature of the Internet services market.[29]

Furthermore, in its *Report to Congress*, the FCC did not disregard the "details" of VoIP services in considering whether certain classes of VoIP products may lack characteristics of information services. As demonstrated by the four criteria for "phone-to-phone" VoIP services that the FCC set forth in the *Report*, above, the FCC did not base its regulatory analysis on the general idea that all IP-based services that "complete[] a voice call" and "generally utilize[] the local exchange carriers' network to originate and terminate the call" should be regulated as "telecommunication services." Instead, the FCC examined the specific details about VoIP service offerings in considering their proper regulatory classification.

Likewise, although the FCC stated in its *Report* that any "phone-to-phone" VoIP services that are found to be "telecommunications services" *may* be subject to access charges as well as other Title II regulations, nowhere in the *Report* did the FCC state that under those circumstances, such services *must* be subject to the same regulations as interexchange and/or local exchange carriers or subject to the same access charges paid by interexchange carriers.[30] Rather, the FCC acknowledged the "difficult" and "contested" issues involved with imposing the

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27 *Report to Congress* at ¶ 90.
28 *Id.*
29 *Id*

circuit-switched regulatory regime on VoIP services, such as whether local exchange carriers ("LECs") even have the ability to determine whether particular VoIP calls are interstate or intrastate in nature.[31]

Moreover, there is no support in the *Report to Congress* for the position of the ILECs that the Commission must impose circuit-switched regulation on "phone-to-phone" VoIP services that "complete[] a voice call" and "generally utilize[] the local exchange carriers' network to originate and terminate the call." Instead, in its *Report*, the FCC refrained from imposing any regulation on any class of VoIP services, "phone-to-phone," or otherwise.

Furthermore, since the release of the FCC's *Report to Congress*, the FCC has declined on several opportunities to change its deregulatory approach toward VoIP services. In one instance, US WEST petitioned the FCC for a declaratory ruling that local exchange carriers could impose access charges on VoIP service providers that met the four criteria for "phone-to-phone" VoIP services., The FCC, however, has not ruled on that petition (or even seek comment on it), which has been pending for almost five years.[32] In another instance, when the instructions to a new consolidated telecommunications reporting worksheet appeared to indicate that VoIP providers were required to contribute to various federal funds, the FCC refused to accept an assertion by one ILEC that VoIP providers were required to contribute to such funds, and deleted all language that appeared to change the FCC's existing regulatory treatment of VoIP services.[33] Additionally, despite pressure to the contrary, the FCC has remained steadfast to its international advocacy position that VoIP should remain unregulated due to the "significant downward

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30 *AT&T Petition for Declaratory Ruling That AT&T's Phone-to-Phone IP Telephony Services Are Exempt from Access Charges*, WC Docket No. 02-361, at 14 (filed Oct. 18, 2002) ("*AT&T Petition*") (citing *Report to Congress* at ¶ 91).

31 *Id.* at 15 (citing *Report to Congress* at ¶ 91).

32 *Petition of U S West, Inc. for Declaratory Ruling Affirming Carrier's Carrier Charges on IP Telephony* (filed Apr. 5, 1999) ("*U S West Petition*").

pressure" VoIP services place on international settlement rates and consumer prices."[34] In light of all of the preceding, the FCC and Congress have made it manifestly clear that the regulatory treatment of VoIP is best left to the development of a national policy and not a Balkanization by the various states succumbing to the unfounded pressures of the ILECs.

d) Intercarrier Compensation Proceeding

The issue of how VoIP should be treated from an intercarrier compensation perspective is pending before the FCC in a Notice of Proposed Rulemaking.[35] In this proceeding, the FCC is considering broad reforms to its intercarrier compensation regime, including whether to implement a bill and keep system. In this *Intercarrier Compensation* proceeding, the FCC has stated that under the current state of the law, VoIP "is exempt from the access charges that traditional long-distance carriers must pay."[36]

The FCC has not issued a final decision in its *Intercarrier Compensation* proceeding, which has been pending for almost two years. Given the period of time that has passed since the FCC first sought comment on the issues in this proceeding, it is likely that the FCC will ask parties to refresh the record before issuing a decision. However, pending completion of this intercarrier compensation rulemaking, federal law remains that VoIP providers offering "enhanced" or "information" services (*i.e.*, those VoIP services that satisfy the FCC's enhanced services test or the Act's definition of "information service") are not required to pay access charges.

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33 *1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms*, Report and Order, 14 FCC Rcd 16602, ¶ 22 (1999).

34 *See Report to Congress* at ¶ 93 (*citing Rules and Policies on Foreign Participation in the US Telecommunications Market and Market Entry and Regulation of Foreign-Affiliated Entities*, Report and Order and Order on Reconsideration, 12 FCC Rcd. 23891 (1997)); *see also* Remarks of Commissioner Susan Ness (as prepared for delivery), Information Session – WTFP (Mar. 7, 2001) ("*Commissioner Ness Remarks*") (emphasis added).

35 *See In the Matter of Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, *Notice of Proposed Rulemaking*, FCC 01-132 (rel. April 27, 2001) ("*Intercarrier Compensation NPRM*").

36 *Id* at ¶133.

e) Pending VoIP Declaratory Rulings

At this time, there are three declaratory ruling petitions concerning VoIP services pending before the FCC. The first was filed by AT&T Corp. ("AT&T") on October 18, 2002.[37] In its petition, AT&T seeks a declaratory ruling from the FCC that confirms (1) AT&T is entitled to subscribe to local services for the provision of its phone-to-phone VoIP services that are carried over the Internet and are permanently exempt from any requirement that they subscribe to access services or pay above-cost access charges; and (2) all other phone-to-phone VoIP services are exempt from access charges unless and until the FCC adopts regulations that prospectively provide otherwise. The FCC has not ruled on AT&T's petition.

The second petition was filed by pulver.com on February 5, 2003.[38] In its petition, pulver.com requests the FCC to declare that its Free World DialUp ("FWD") VoIP service is neither "telecommunications" nor a "telecommunications service" that is subject to federal regulation. pulver.com describes FWD as a service that "facilitates point-to-point broadband Internet Protocol (IP) communications." Customers of FWD register with pulver.com to obtain a free user ID and password to access the service. They then can use IP telephones purchased from third-party vendors to make VoIP calls over their broadband connection purchased from the provider of their choice (whether cable, wireline, satellite or wireless). FWD "members" can only call other FWD members and are assigned unique FWD numbers that are not part of the North American Numbering Plan. pulver.com argues that because FWD does not provide the customer with any transmission capabilities, the service is not "telecommunications" as defined under the Act. pulver.com also maintains that FWD is not a "telecommunications service" under the Act because it is provided to users free of charge instead of "for a fee." As such, pulver.com

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[37] *AT&T Petition for Declaratory Ruling That AT&T's Phone-to-Phone IP Telephony Services Are Exempt from Access Charges*, WC Docket No. 02-361 (filed Oct. 18, 2002).

submits that FWD is not a regulated service subject to the FCC's Title II jurisdiction. This petition is pending.

The third petition was filed by Vonage Holdings Corporation ("Vonage") on September 22, 2003.[39] Vonage requests that the FCC preempt the Minnesota Public Utilities Commission ("MN PUC") from imposing common carrier regulation on Vonage's VoIP service. Vonage's service is only available to users that have a pre-existing high-speed Internet connection, for example, a Digital Subscriber Line ("DSL") or cable modem connection to the Internet. Additionally, Vonage customers must use a Multimedia Telephone Adapter ("MTA") attached to their computer's cable modem, or, for DSL configurations, a router to make use of the service. The MTA allows Vonage customers to convert analog voice signals into digital Internet Protocol ("IP") data packets that travel over the Internet in an asynchronous mode. Vonage subscribers can also use the MTA to convert digital IP packets that travel over the Internet into analog voice signals.

Vonage argues that preemption is warranted because the MN PUC's Order conflicts with two decades of FCC policy encouraging the development of information services free from traditional common carrier regulation. Vonage also submits that the MN PUC's regulations should be preempted by the FCC because it is impossible to separate the Internet, or any service offered over it, into intrastate and interstate components.

The FCC released a public notice concerning the Petition on September 26, 2003.[40] Comments regarding the Petition were due October 27, 2003 and replies are due November 24, 2003. However, since Vonage filed its VoIP Petition, the United States District Court for the

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[38] *pulver.com Petition for Declaratory Ruling That pulver.com's Free World Dial Up Is Neither Telecommunications or a Telecommunications Service*, WC Docket No. 03-45 (filed Feb. 5, 2003).

[39] *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211 (filed Sept. 22, 2003).

District of Minnesota, on October 16, 2003, permanently enjoined the MN PUC from enforcing its order.[41] Therefore, it is likely that the FCC dismisses Vonage's VoIP Petition as moot.

f) Initiation of VoIP Proceeding

Just a few weeks ago, the FCC announced that it intends to initiate a rulemaking by the end of this year to consider the regulatory issues surrounding VoIP services.[42] In conjunction with this proceeding, the FCC has indicated that it may hold public forums or hearings on VoIP regulatory issues.[43] Additionally, the administrator of the federal Universal Service Fund, the Universal Service Administrative Company ("USAC"), recently amended its list of supported services to *exclude* VoIP. In so doing, USAC noted that "[t]he Federal Communications Commission has not determined whether Voice over IP (VoIP) is a telecommunications service or an application provided over unregulated information service" and "[p]ending resolution of this issue, VoIP service is not eligible for funding."[44]

In sum, the FCC has repeatedly refused to regulate VoIP services, although it has had ample opportunity do so. Recognizing the inherent difficulty in establishing broad classifications for VoIP due to its rapidly evolving nature and due to the importance of developing a national policy, the FCC instead has decided to adopt a case-by-case approach in determining whether a particular type of VoIP service should be regulated as a telecommunications service.

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40 *Pleading Cycle Established for Comments on Vonage Petition for Declaratory Ruling*, Public Notice, DA 03-2952 (rel. Sept. 26, 2003)

41 *See* Section I.B, *infra*, for a description of the Minnesota District Court decision.

42 Comm. Daily, Vol. 23, No. 200 (Oct. 16, 2003).

43 *Id.*; *see also* Comm. Daily, Vol. 23, No. 190 (Oct. 2, 2003).

44 Eligible Service List of the Schools and Libraries Support Mechanism (Oct. 10, 2003), *available at* http://www.sl universalservice.org/reference/eligible asp.

2. State Commissions Deregulatory Approach Toward VoIP Services

Many other state regulatory commissions have faced issues related to imposing certain aspects of traditional regulatory regimes on VoIP services. At least eight other state commissions – Colorado,[45] Florida,[46] Georgia,[47] Kentucky,[48] Nebraska,[49] North Carolina,[50] Oregon[51] and Washington[52] – and one Minnesota federal court[53] have declined to impose

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[45] *Petition of Level 3 Communications, LLC for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996,* Docket No. 00B-601T, Initial Commission Decision, Decision No. C01-312 (Colo. P.U.C. Mar. 30, 2001) (declining to require a definition of switched access traffic that included IP telephony in an interconnection agreement as requested by Qwest) ("*Level 3 Colorado Arbitration Decision*"); *Petition by ICG Telecom Group, Inc, for Arbitration of an Interconnection Agreement with US West Communications, Inc., Pursuant to Section 252(b) of the Telecommunications Act of 1996,* Docket No. 00B-103T, Decision Denying applications for Rehearing, Reargument, or Reconsideration, Decision No. C00-1071, 11 (Colo. P.U.C. Sept. 27, 2000) (declining to require a definition of switched access traffic that included IP telephony in an interconnection agreement as requested by Qwest) ("*ICG Colorado Arbitration Decision*").

[46] *Petition of CNM Networks, Inc for declaratory statement that CNM's phone-to-phone Internet Protocol (IP) telephony is not" telecommunications" and that CNM is not a "telecommunications company" subject to Florida Public Service Commission jurisdiction,* Docket No. 021061-TP, Order Denying Petition for Declaratory Statement (Fla. P.S.C. Dec. 31, 2002) (concluding that petition for declaratory statement regarding the regulatory status of VoIP services should be denied because regulation of IP-based services warranted a cautious approach that could be better handled in a staff-supervised workshop on the subject).

[47] *Petition of Sprint Communications Company L.P. For Arbitration with BellSouth Telecommunications, Inc.* Docket No. 12444-U (Ga. P.S.C. May 1, 2001) (declining to require a definition of switched access traffic that included IP telephony in an interconnection agreement "until it can further consider the issue."); *Petition of BellSouth Telecommunications, Inc. for Arbitration of an Interconnection Agreement with Intermedia Communications, Inc* , Docket No. 11644, Order (Ga. P.S.C. Sept. 28, 2000) (declining again to require a definition of switched access traffic that included IP telephony in an interconnection agreement as requested by BellSouth).

[48] *Petition by AT&T Communications of the South Central States, Inc. and TCG Ohio for Arbitration of Certain Terms and Conditions of a Proposed Agreement with BellSouth Telecommunications, Inc.*, Case No. 2000-465 (Ky. P.S.C. May 16, 2001) (declining to address the issue of IP telephony in the absence of a more complete record focused on individual service offerings).

[49] *Internet Telephony of the Telecommunications Industry*, App. No. C-1825/PI-21 (Neb. P.S.C. Sep. 28, 1998) (concluding that imposition of regulatory requirements on VoIP services was not warranted because VoIP "does not place the same burdens upon the network as does traditional switched telecommunications" and imposition of such regulations likely "could suffocate the development of IP telephony."). The Nebraska Public Service Commission ("NE PSC") has decided to consider VoIP's role in access charges and universal services in a separate access charge/universal service reform proceeding pending before the NE PSC. The NE PSC has sought comment on these issues, but has not yet issued a final decision with respect to VoIP. *See Investigation Into Intrastate Access Charge Reform*, App. No. C-1628 (Neb. P.S.C. Oct. 2, 1998).

[50] *MCImetro Access Transmission Services, LLC*, Docket No. P-474, Sub 10 (N.C.U.C. Aug. 2, 2001) (declining to require a definition of switched access traffic that included IP telephony in an interconnection agreement and declined to address the appropriate treatment of IP telephony as it pertains to reciprocal compensation.)

[51] *Level 3 Communications, LLC*, ARB 332, Order No. 01-809 (Ore. P.U.C. Sep. 13, 2001) (approving an arbitrator's decision to exclude IP telephony from the definition of switched access services for which access charge compensation would be required.).

[52] *Investigation into U S West Communications, Inc.'s Compliance with Section 271 of the Telecommunications Act of 1996,* Docket Nos. UT-003022 and UT-003040, Initial Order Finding Noncompliance in the Areas of Interconnection, Number Portability, and Resale, ¶ 175 (W.U.T.C. Feb. 2001) (requiring Qwest to strike all references to phone-to-phone VoIP in its proposed Statement of Generally Available Terms under review in a Section 271 proceeding.)

traditional circuit-switched regulatory obligations on VoIP services, whereas only three state commissions – New York,[54] Minnesota[55] and Tennessee[56] – and one Colorado state court[57] have taken the opposite position.[58]

None of the three cases that imposed a traditional circuit-switched regulatory burden on VoIP should be persuasive to this Commission. The Colorado state court case conflicts with the Minnesota federal court decision that found federal law preempts state regulation of VoIP information services.[59] With respect to the New York and Tennessee decisions, it is important to note that the commissions in these states ignored the FCC's guidance in its *Report to Congress* regarding the regulatory treatment of VoIP.[60] It is also critical to note that the New York Public

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53 *Vonage Holding Corporation v. Minn. Pub. Serv. Comm'n, et al.*, Civil No. 03-5287 (MJD/JGL), Memorandum and Order (D. Minn. Oct. 16, 2003) ("*Minnesota Vonage Permanent Injunction Order*") (finding that state regulation of VoIP provider Vonage was preempted by federal law's mandate that information services remain free from carrier regulation).

54 *Complaint of Frontier Telephone of Rochester Against US DataNet Corporation Concerning Alleged Refusal to Pay Intrastate Carrier Access Charges*, Case 01-C-1119, Order Requiring Payment of Intrastate Carrier Access Charges (N.Y.P.S.C. May 31, 2002) (ruling that a particular phone-to-phone IP telephony service that utilized IP transport for only 60% of its traffic was a telecommunications service subject to the same regulations as conventional long distance service.).

55 *Complaint of Minnesota Department of Commerce against Vonage Holding Corp Regarding Lack of Authority to Operate in Minnesota*, Docket No. P-6214/C-03-108, Order Finding Jurisdiction and Requiring Compliance (Minn. P.U.C. Sept. 11, 2003) (finding that IP telephony provider Vonage was offering "two-way communication that is functionally no different than any other telephone service" and thus the company's service constituted "telephone service" as defined by Minnesota law) ("*MN PUC Vonage Order*")

56 *Petition of MCImetro Access Transmission Services, LLC and Brooks Fiber Communications of Tennessee, Inc. for Arbitration of Certain Terms and Conditions of Proposed Agreement with BellSouth Telecommunications, Inc.*, Docket No. 00-00309, Interim Order (T.R.A. Apr. 3, 2002) (holding that calls using IP, regardless of whether the call is data or voice, should be treated the same as circuit switched traffic.).

57 *Qwest Corporation v. IP Telephony, Inc.*, Case No. 99 CV 8252, Slip op. at 1-2 (Denver D. Ct. Jan. 12, 2001) (ordering a provider of IP telephony services to pay access charges to Qwest) ("*Colorado Court Qwest Decision*").

58 Various other state commissions, such as California, Colorado, Florida, Illinois, Ohio, Pennsylvania and Washington, have opened proceedings to consider VoIP issues, or announced their intention to do so, or held workshops.

59 *Compare Colorado Court Quest Decision* (in which a Colorado state court ordered a provider of IP telephony services to pay access charges to Qwest) *to Minnesota* (in which a federal court found that state regulation of a VoIP provider was preempted by federal law's mandate that information services remain free from carrier regulation).

60 Specifically, the New York Public Service Commission ("NY PSC") misinterpreted the FCC's statement in its *Report to Congress* that the FCC "*may* find it reasonable" to impose "similar access charges" to VoIP in future proceedings as requiring the imposition of access charges in the proceeding that was before the NY PSC. *See Complaint of Frontier Telephone of Rochester Against US DataNet Corporation Concerning Alleged Refusal to Pay Intrastate Carrier Access Charges*, Case 01-C-1119, Order Requiring Payment of Intrastate Carrier Access Charges (N.Y.P.S.C. May 31, 2002). In the Tennessee decision, rather than relying on the FCC's guidance in its *Report to Congress* with respect to the regulatory treatment of VoIP, the Tennessee Regulatory Authority ("TRA") instead relied on the previous determination by the FCC that calls delivered to Internet service providers comprise interstate

Service Commission ("NY PSC") used a case-by-case approach to resolve the issue before it and limited the impact of its decision to the facts at hand.[61] The NY PSC indicated that its analysis should not be construed as a policy with respect to all VoIP services.[62] Finally, as discussed in more detail in the next section, the Minnesota Public Utility Commission's ("MN PUC") decision to assert jurisdiction over a VoIP provider was permanently enjoined by a federal district court as a violation of federal law.[63]

For purposes of this proceeding, because the Alabama Code does not provide a specific definition of what constitutes a "telephone line" requiring state regulation, this Commission has some flexibility in deciding whether to assert jurisdiction over VoIP providers under state law.[64] In at least one instance, this Commission declined to assert jurisdiction over a new technology, cellular service, explaining that it would be in the "best interest" of the then "emerging cellular industry to refrain from the exercise of regulatory jurisdiction over this industry at that time."[65] Because VoIP is still an emerging technology and a nascent industry, the Commission should exercise the same discretion.

Joint Commenters urge the Commission to follow the lead of the FCC and a majority of state commissions and its own precedent and refrain from imposing burdensome circuit-switched regulatory obligations on another "emerging" industry – VoIP service. At a minimum, Joint

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access. Noting that the FCC did not preclude states from applying this same analysis to voice traffic delivered via IP, the TRA determined that "it does not matter whether a call is voice or data for purposes of intercarrier compensation. The TRA further cited to FCC statements that "there are [no] inherent differences between the costs of delivering a voice call to a local end-user and a data call to an ISP," concluding that calls using IP should be treated as circuit switched calls.

61 In the New York case, the call was converted from circuit-switched format to IP format back to circuit-switched format, resulting in no net protocol conversion. In addition, only 60% of the calls actually used IP format for the middle leg. *See Complaint of Frontier Telephone of Rochester Against US DataNet Corporation Concerning Alleged Refusal to Pay Intrastate Carrier Access Charges*, Case 01-C-1119, Order Requiring Payment of Intrastate Carrier Access Charges (N.Y.P.S.C. May 31, 2002).

62 *See id.*

63 *See Minnesota Vonage Permanent Injunction Order.*

64 *See* Ala. Code § 37-2-1; *see also* Ala. Code § 37-1-30.

65 *Telephone Companies and Radio Utilities (Cellular Radio and Telephone Service)*, Docket 19068, Generic Order Concerning Regulation of Cellular Radio and Telephone Service (Ala. P.S.C. Feb. 13, 1985).

Commenters urge the Commission to consider deferring its decision in this proceeding until presented with a specific factual pattern. The reasons for this are three-fold.

First, VoIP technology presents a difficult regulatory proposition for states due to the difficulty in determining the jurisdictional nature of a particular VoIP call. As the Director of Technology Policy for Verizon Communications has acknowledged, "[i]t's hard to determine jurisdictionally where [an] IP end-point is."[66] VoIP is similar to Internet service in that it blurs traditional distinctions between local and long distance services, between intrastate and interstate services, and between voice, fax, data and video services. Packets routed through VoIP networks transmit indistinguishable bits of data over non-geographical, non-hierarchical means. As such, VoIP networks are comprised of streams of data-related packets, each of which could be carrying digitized voice messages, a computer program being downloaded from a remote service, or video transmissions. In other words, a state commission that would seek to regulate VoIP services would be faced with the daunting task of distinguishing the intrastate portion of a particular type of VoIP service for which it has jurisdiction to regulate. Such a distinction would be difficult, if not impossible, to establish and thus the Commission should wait until the FCC has provided further guidance on the subject.[67]

Second, as a newly developing technology, VoIP should not be exposed to different regulatory regimes across the country and having to guess where to make investments. As the FCC and the Minnesota District Court have recognized, such circumstances would hinder the growth and progress of VoIP services as providers become forced to expend valuable resources

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[66] *States Push to Regulate VoIP as Voice*, Telephony (Sept. 22, 2003), *available at* www.telephonyonline.com.

[67] As the Commission is likely aware, the National Association of Regulatory Utility Commissioners has adopted a resolution that calls for the FCC and the State commissions to work together under the auspices of the Joint Conference on Advanced Services to address questions relating to VoIP.

on unwieldy administrative issues involved in responding to potentially 51 state regulatory regimes.[68]

Third, in light of the recent Minnesota decision described in the next section, waiting until the FCC provides further guidance on these issues would be a prudent course of action to avoid potential preemption under federal law, both as it currently exists and as a result of eminent FCC action in this area.

B. The Commission Is Preempted From Applying Common Carrier Regulations to VoIP Services

Recently, a federal district court permanently enjoined the MN PUC from enforcing an order that sought to regulate a VoIP service provider. The court determined that the MN PUC's action was preempted by the 1996 Act's mandate that Internet and information services remain unregulated.[69] As this case demonstrates, broadly applying carrier regulation on a wide range of VoIP services as proposed in the ILEC Petition is fundamentally flawed. Since the ILEC Petition seeks to regulate all VoIP services, regardless of whether those services bear the characteristics of regulated telecommunications services, the adoption of such a proposal by the Commission would be subject to preemption by federal law.

The MN PUC based its Order on the "quacks like a duck" argument that also underlies the ILEC Petition. In an Order released on September 11, 2003, the MN PUC found that IP telephony provider Vonage was offering "two-way communication that is functionally no different than any other telephone service" and thus the company's service constituted "telephone service" as defined by Minnesota law [70] Expressly declining to consider federal policy, including the FCC's *Report to Congress*, the MN PUC based its decision on the state definition of "telephone service," considering two factors: (1) the functional similarity between

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[68] *See Minnesota Vonage Permanent Injunction Order* at 18 (*citing Report to Congress* at ¶46).

Vonage's service and traditional telephone service; and (2) that Vonage's service "intersects the public switched telephone network."[71] As such, the MN PUC determined that it had jurisdiction over Vonage's VoIP service offering, and ordered the company to comply with Minnesota statutes and rules applicable to common carriers, including certification requirements and E911/911 obligations.

On October 7, 2003, the U. S. District Court for the District of Minnesota ("Court") permanently enjoined the MN PUC from enforcing its order. Citing to the FCC's *Report to Congress*, the Court found that Congress and the FCC had made it clear that 1996 Act required that common carrier regulation be limited to "telecommunications service" providers instead of "information service" providers, and thus "information service" providers could not be subject to carrier regulation merely because they provide their services "via telecommunications."[72]

Rejecting the MN PUC's "quacks like a duck" argument, the Court instead determined the appropriate regulatory classification of Vonage's VoIP service by applying the telecommunications "phone-to-phone" VoIP characteristics described by the FCC in the *Report to Congress*. The Court concluded that even though Vonage's VoIP service *uses* "telecommunication services," the company did not provide a "telecommunications service" because Vonage's VoIP service performs a net protocol conversion that permits communications between the Internet and Public Switched Telephone Network ("PSTN").[73] As such, the Court found that Vonage's VoIP service was not a "telecommunications service," but rather an unregulated "information service" that offers "the capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via

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69 *Minnesota Vonage Permanent Injunction Order* at 6-22.
70 *MN PUC Vonage Order* at 8.
71 *Id.*
72 *Minnesota Vonage Permanent Injunction Order* at 10-17.
73 *Id* at 11-15.

telecommunications." [74]

Importantly, in finding that Vonage is an information service provider, the Court agreed with the FCC that Congress has expressed its desire that information services—such as those VoIP service provided by Vonage—must not be regulated by state law, which would decimate Congress' mandate that the Internet remain unfettered by regulation.[75] Accordingly, because the MN PUC order sought to regulate Vonage's VoIP service – an unregulated information service under federal law – the Court concluded that the MN PUC order conflicted with federal law and thus preemption was required.[76]

Contrary to the ILECs' claims that the "details" of VoIP services are not important, this Commission cannot impose state regulations on a broad class of VoIP providers that fall into the vague category of services that "complete a call" and "generally utilize a local exchange carriers' network to originate or terminate the call." As the Minnesota case demonstrates, and as the FCC emphasized in *its Report to Congress*, any state regulatory classification of VoIP services must be done on a case-by-case basis with careful deliberation concerning the methodology of provisioning, technical capabilities and applications of a particular type of VoIP service. Indeed, the ILECs "quacks like a duck" argument suffers from the fact there are so many different types of VoIP applications and services. While some eventually may be regulated as "telecommunications services," certainly not all should be. It is for this very reason that a case-by-case analysis of a specific VoIP service is the correct approach in determining the regulatory treatment for IP-based telephony services.

Likewise, Commission cannot limit its inquiry in this proceeding to whether VoIP providers could be classified as a "transportation company" that operates a "telephone line"

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74 *Id.*

75 *Id.* at 18 (citing *Report to Congress* at ¶46).

under state law. Rather, full consideration must be given to whether a particular type of VoIP service is an unregulated "information service" that must be remain free from common carrier regulation as mandated by the 1996 Act. Only if this Commission determines that a particular VoIP service demonstrates characteristics consistent with a regulated "telecommunications service" under federal law may it proceed to determine whether that VoIP provider is a "transportation company" subject to regulation under Title 37 of the Alabama Code. Otherwise, this Commission could quickly run afoul of the 1996 Act's mandate that information services remain unfettered of state regulation and find itself preempted by federal law.[77]

C. The Commission Must Reject the ILECs' Proposed Interpretation of "Transportation Company" as Overly Broad

The ILEC Petition claims that VoIP providers should be regulated as "transportation companies" under the Alabama Code because they "own, operate, lease, manage or control, as common carriers for hire . . . any *telephone line*."[78] Although "telephone line" is not defined in statute, the term implies that the communication must necessarily involve a telephone. Yet as the ILEC Petition readily admits, customers of VoIP services do not always use a telephone and may instead utilize personal computers to place "calls" using their VoIP service.[79] For example, a VoIP customer might configure their personal computer equipment so that the microphone and speakers attached to the computer are used as the audio input and output. And even those VoIP customers that do use a traditional telephone may not be able to use that telephone without additional CPE necessary to access their provider's service.[80] In short, a VoIP provider may not know whether its customer uses traditional telephones, nor may it be able to determine such

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76 *Id* at 17-20.
77 *See* discussion of *Minnesota Vonage Permanent Injunction Order*, *supra*, at Section I.B.
78 ILEC Petition at 3 (emphasis added).
79 *Id* at 3.
80 *Minnesota Vonage Permanent Injunction Order* at 4, 13.

information without intrusive and unnecessary investigation into each customer's use of its service.

Moreover, although the ILEC Petition interprets "transportation companies" as companies that provide only voice services over "telephone lines," it could just as easily apply the same rationale to argue for regulation of intrastate "communications" in the form of data signals sent over "telephone lines." Adopting the ILECs' argument therefore threatens to lead the Commission down the slippery slope of state regulation of e-mail, instant messaging, interactive video, and all other forms of two-way electronic communications (including "computer-to-computer" VoIP service, which the FCC has expressly classified as an information service).[81] The Commission therefore should reject the ILEC Petition's overly broad interpretation of a "telephone line."

D. Premature or Imprecise Regulatory Action Will Inhibit, Rather Than Enhance, Competition

If not hindered by undue regulation, VoIP technology will continue to develop exciting, innovative and economically efficient applications for customers. As discussed in Section II, VoIP is emerging and evolving in the marketplace, is highly dynamic, and is not capable of easy categorization at this point. The Commission should avoid taking action that would force VoIP services into existing telecommunications regulatory service models. Premature or imprecise regulatory action will inhibit, rather than enhance, competition and consequently damage the economic interests of the citizens and business of Alabama. The Commission should take a cautious approach to allow VoIP services to develop without unnecessary telephone regulation.

For example, Joint Commenters' networks are constructed to make the most of the rapidly decreasing costs of moving information in packetized form. However, consumers will

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[81] *Report to Congress* at ¶87.

not benefit from the technological change that drives those costs down unless companies offering such advanced services can interconnect and exchange traffic with circuit-switched networks without being saddled with either the artificial economic inefficiencies of those legacy networks or the regulations that were developed in a monopoly provider environment based upon hub-and-spoke network technologies and protection of ratepayer investment in subsidized monopoly networks.

The advent of VoIP could play at least two important roles in the market. First, if left free to respond to customer demand and expectations, VoIP services could stimulate much-anticipated broadband deployment and business development. IP-enabled services allow providers, businesses and consumers to combine voice, data, video, and other applications more seamlessly than is possible on today's PSTN. Forcing one kind of IP-enabled service – voice – into a regulatory category separate from other IP-enabled services will only frustrate this goal and deny business and consumers the choices they are seeking in a more competitive communications and information services marketplace.

The second important role that VoIP could play is a corrective one. VoIP may best be viewed as an opportunity to remedy the antiquated inconsistencies and inefficiencies in telephone regulation today. A system that treats the same PSTN network function at least five different ways for jurisdictional and compensation purposes cannot be sustained in a competitive marketplace.[82] VoIP challenges outdated regulatory models by treating all packets as packets,

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[82] In her statement accompanying the FCC's Notice of Proposed Rulemaking regarding a unified intercarrier compensation regime, Commissioner Ness astutely noted that the exact same network function can have multiple prices – and even differing directions of payment – depending upon whether the call is deemed local, long distance, Internet-bound, CMRS or paging in nature. *See Developing a Unified Intercarrier Compensation Regime,* CC Docket No. 01-92, Notice of Proposed Rulemaking (rel. Apr. 27, 2001), at Separate Statement of Commissioner Ness. Add to this the complexities of intraLATA toll and interLATA toll, and interstate and intrastate splitting of traffic, and it becomes all too clear that Commissioner Ness was on the mark in stating that "[i]n an era of convergence of markets and technologies, this patchwork of regimes no longer makes sense. What had been a historical artifact may have become an unsustainable anomaly." *Id.* Joint Commenters submit that the nascent

whether they are voice, video, or data, and regardless of where they originate and terminate. Rather than trying to squeeze the round pegs of VoIP into the square holes of traditional telephony regulation, the Commission should use this opportunity to revisit and reform the existing regulatory framework and compensation mechanisms in anticipation of new services.

II. THE FLEXIBILITY PROVIDED BY IP-ENABLED SERVICES MAKES A "ONE-SIZE-FITS-ALL" APPROACH TO REGULATION OF SUCH SERVICES DIFFICULT, IF NOT IMPOSSIBLE, TO ADMINISTER AND LIKELY WOULD BE IN VIOLATION OF FEDERAL LAW.

The range of VoIP applications available is increasingly broad, and more services are under development. VoIP applications are an innovative step forward in communications and the advantages to the end users are many. By using a lower-cost, more flexible network technology with more intelligence and functionality concentrated in customer hardware rather than in provider-controlled equipment, VoIP has the potential to provide unique services, features and applications unavailable in the legacy PSTN. For example, VoIP applications can enable users to access all forms of messages – voice mail, e-mail, fax, and video mail – from a common mailbox. This would be difficult or extremely expensive to accomplish over the wireline PSTN, which has its intelligent functionality embedded in the network itself and therefore cannot easily be engineered to provide such applications.

In their Petition, the ILECs admit that there are different types of IP-based telephony services and even provide brief descriptions of a few such services.[83] However, instead of requesting that the Commission follow federal law and make regulatory determinations about IP telephony on a case-by-case basis, they ask the Commission to do what it cannot -- capture virtually all VoIP services, both those with and without the characteristics of

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emergence of VoIP is the catalyst that finally makes clear that the historical patchwork of intercarrier compensation regimes *has in fact become* an unsustainable anomaly.

[83] ILEC Petition at 3.

telecommunications, under state regulation by using a broad, generalized definition of regulated IP telephony services.

As explained above, contrary to the ILECs' suggestions in their Petition, the FCC did not even insinuate that a broad, general approach to the regulation of VoIP services would comport with Congress' mandate that the Internet remain unfettered by burdensome regulations designed for the PSTN. Rather, the FCC recognizes that each type of VoIP services needs to be analyzed separately to determine whether that particular type of service is an "information service" or a "telecommunications service" that could be regulated in compliance with federal law.[84] Additionally, as previously described, the FCC acknowledged the difficulty in categorizing VoIP applications due to the "dynamic" and "emerging" nature of the technology.[85]

Significantly, the ILECs' proposition that the Commission regulate all IP-based telephony services that "complete a voice call" and "generally utilize[] a local exchange carriers' network to originate or terminate the call" as a "transportation company" under Title 37 of the Alabama Code would result in Commission regulation of not only VoIP services that lack the characteristics of an unregulated information service, but also those that qualify as an information service. For example, two residential AOL customers using dial-up AOL accounts and running a VoIP application on their computers are "generally utiliz[ing] a local exchange carriers' network to originate or terminate the call" in order to "complete a voice call." Under the ILECs' proposal, this type of VoIP service would be subject to Commission regulation as a "transportation company," even though such a service would be a "computer-to-computer" VoIP information service that is not regulated under federal law.[86]

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84 *Report to Congress* at ¶¶86-91.
85 *Id.* at ¶90.
86 *See id.* at ¶87.

Moreover, the flexibility provided by IP-enabled services makes a "one-size-fits-all" approach to regulation of such services difficult, if not impossible, to administer, and thus could hinder the deployment of such services, which would be contrary to the public interest. In order to preserve the benefits that evolving Internet and information services will bring to Alabama consumers, this Commission should decline to impose legacy common carrier regulation on these emerging VoIP services because it would stifle the growth of these exciting new services.

III. ILEC CLAIMS THAT ACCESS CHARGE REVENUES WILL DECLINE DO NOT JUSTIFY REGULATION OF VOIP SERVICES.

Joint Commenters submit that VoIP services should be seen as a catalyst for rationalizing a confusing, conflicting, and inefficient patchwork of intercarrier compensation regimes that serve primarily to hinder the development of a competitive telecommunications marketplace. The rates to be paid by interconnecting networks should reflect nothing more than the costs associated with the network functions performed, and there should be a single rate for each network function developed based upon those costs.

Joint Commenters expect that a number of ILECs will plead with the Commission to protect and sustain their monopoly-era revenue streams by subjecting all VoIP communications – without reference to whether such services are telecommunications or information in nature – to intrastate switched access charges. Such claims of entitlement are contrary to law and unfounded. ILECs typically describe how most interexchange carriers would convert their networks over to IP technology should VoIP remain exempt from access charges, leading to the ultimate elimination of access charges that ILECs allege are needed to maintain their local networks.[87] Such claims, however, usually lack any supporting factual evidence.

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[87] *See, e g., AT&T's Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services Are Exempt from Access Charges*, WC Docket No. 02-361, Comments of Frontier Telephone of Rochester, Inc. at 3, Comments of Missouri Small Telephone Company Group at 6, and Comments of National Exchange Carrier Association at 6.

Contrary to the ILECs' characterization of the interexchange market, VoIP service is still very much an emerging technology that has made little progress in supplanting the interexchange market. VoIP's small market share is striking given that over five years have passed since the FCC issued its *Report to Congress* discussing VoIP services and technology. In short, market statistics do not support ILEC claims of drastic access charge revenue reductions due to an industry movement to VoIP.

Moreover, any ILEC claims that the "sky-is-falling" because of "lost" access charges fail to consider that VoIP providers compensate ILECs for the use of their local networks either by paying local end user service rates or by paying cost-based termination charges for reciprocal compensation. Not satisfied with this compensation, ILECs consistently attempt to force VoIP providers to move from existing services to non-cost-based access services in an effort to maintain (or increase) their access charge revenue stream. The fact that ILECs have historically enjoyed an access charge revenue stream does not mean that they are entitled to receive those revenues in perpetuity regardless of advances in technology and consumer desires. Accordingly, the Commission should reject any such unsubstantiated claims by the ILECs unless and until they provide sound, objective information that links a continued VoIP access charge exemption with the material demise of access charges.

In adopting the *CALLS* compromise, the FCC recognized the difficulty of determining the costs, implicit subsidies, and profit components of access charges.[88] The ILECs typically threaten that they will be forced to raise end user customer rates if access charge revenue streams diminish. Their unwarranted concern suggests that ILECs are using access charges to subsidize their provision of service to their local end users. Section 254(e) of the Communications Act of

1934, as amended, however, provides that universal service support "should be explicit."[89] Indeed, the Fifth Circuit made clear in *TOPUC* that Section 254(e) prohibits implicit subsidies for universal service support.[90] The Fifth Circuit further concluded that requiring ILECs to recover their universal service contributions from their interstate access charges constituted an implicit subsidy "in violation of a plain, direct statutory command" under Section 254(e) of the Act.[91]

It appears that the ILECs are doing exactly what Section 254(e) prohibits – using access charge revenues as an implicit subsidy to provide universal service support to their customers. If this is true, the Commission should take immediate action to extract any implicit subsidies from access charges, not force VoIP providers to sustain such illegal subsidies by moving their traffic from cost-based local retail and termination services to above-cost access services. In sum, ILECs continually fail to provide convincing evidence that their current streams of access charge revenues are necessary to maintain affordable local rates, and even if those revenues are supporting local rates, under Section 254(e) of the Act, they may no longer do so. In this regard, Joint Commenters reiterate their primary position that the Commission should view the advent of VoIP services as a corrective opportunity rather than as a chance to extend traditional telephony regulation. The questions presented by VoIP provide regulators the opportunity to take the steps first outlined in 1996 by rationalizing intercarrier compensation and addressing concerns (if valid

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88 *See Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Low-Volume Long-Distance User, Federal-State Joint Board on Universal Service*, 15 FCC Rcd 12962, ¶¶ 26, 201 (2000) (*CALLS*).

89 47 U.S.C § 254(e).

90 *Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 425 (5th Cir. 1999) (*TOPUC*) ("we are convinced that the plain language of § 254(e) does not permit the FCC to maintain *any* implicit subsidies for universal service support.").

91 *Id.*; *see also Alenco Communications, Inc. v. FCC*, 201 F.3d 608, 623 (5th Cir. 2000) ("we made clear in *TOPUC* that the implicit/explicit distinction turns on the distinction between direct subsidies from support funds and recovery through access charges and rate structures ").

and substantiated) regarding end user rates through adoption of a competitively neutral, adequately funded explicit universal service contribution system.

Even if the ILECs are losing access charge revenue, any such losses would not justify classifying all VoIP services as telecommunications services. The Commission should not adopt rules based on vague threats of local rate increases by the ILECs.[92] Rather, it should adopt rules based on applicable law, relevant facts, and the public interest. At bottom, the ILECs' position appears to be that voice is voice and so long as VoIP telephony transmits voice communications, regardless of whether it actually qualifies under a statutory definition, it is a telecommunications service subject to access charges. While some VoIP services will not be enhanced, and there are in fact cases where an IP-based service will therefore be subject to access charges, that does not justify a conclusion that *all* such services, or even a subset of such services, are *never* enhanced and should as a default be subject to access charges. Nor does it justify the ILECs engaging in self-classification of services and imposing their view of the world on the rest of the industry at the threat of disconnection or interrupted traffic flows.

IV. CONCLUSION

VoIP services, as they continues to evolve in the marketplace and outside the traditional telecommunications regulatory structure, are highly dynamic and not capable of easy encapsulation. As such, sweeping, simplistic regulatory declarations about VoIP services are both dangerous and counterproductive, which is why the FCC applies its basic/enhanced distinction on a case-by-case basis, evaluating the specific attributes of a particular service to

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92 The unavoidable fact is that toll usage is a dying species. Some of the most vigorous competition seen since 1996 is arising as carriers implement flat-rated local and long distance calling plans in response to consumer demand. Moreover, one cannot help but notice that the widespread availability of e-mail and instant messaging ("IM") is resulting in less and less toll calling, and that access charge revenues must be falling as a result. Does this mean that e-mail and IM should be subject to access charges too? To Joint Commenters' knowledge, no ILEC has made such a claim thus far. Of course, one reason may be that ISPs through whom customers access such enhanced services are in many cases owned by or affiliated with the ILECs themselves.

determine whether it should be subject to traditional regulatory obligations. This Commission should similarly be careful to ensure that any traditional telephone regulations applied to VoIP providers are consistent with governing law, the mission and statutory mandate of removing regulatory barriers to competition, and the public interest in competition and choice. Joint Commenters urge the Commission to follow the lead of the FCC, seven other state commissions, and the District of Minnesota Court by adopting a deregulatory policy towards VoIP services and not imposing on such services traditional circuit-switched regulations, including above-cost access charges, that likely would serve only to stunt growth and stifle innovation in this developing market.

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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing on the following listed persons by placing a copy of same in the United States mail, postage prepaid and properly addressed on this 31ST of October, 2003:

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